UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 09 CR 1120 (PKC)

HAN CAVAN,

Defendant.

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New York, N.Y.
July 8, 2016
11:30 a.m.

Before:

HON. P. KEVIN CASTEL,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
EDWARD IMPERATORE
Assistant United States Attorney

ARNOLD LEVINE
Attorney for Defendant

(Case called)

THE COURT: Good morning.

Just to set the stage, this is a continuation of the argument on defendant's motion to dismiss the indictment for a violation of the constitutional speedy trial protection in that there was a gap of 34 months from the date of the indictment, November 19, 2009, and the date on which the U.S. government sought extradition of the defendant from Canadian authorities on September 14, 2012.

I gave the parties an opportunity to examine further what there was in the record regarding the actions of the Canadian authorities. And, while I had information before me regarding the surrender decision of the Canadian minister of justice, I now have the full text of Minister Peter McKay's determination, and I have the benefit of a letter submission from the government.

I wanted to give Mr. Levine an opportunity to respond to that and also to bring to my attention anything else that he believes I should consider in deciding this motion.

MR. LEVINE: Yes, your Honor. I think I will be relatively brief in responding to the government's letter. Some of this has already been said, either in writing or at the previous argument. Since the government rehashed some of it, I think, if you would indulge me, I will rehash again.

As to the government's first point, the government

acknowledges that the minister of justice had the discretion to order the release of Mr. Cavan to the United States pursuant to an extradition request, if he so chose, although the government then continues to sort of ignore that clause and the minister's own decision and goes on to say that the Canadian authorities could not release him before the expiration of his sentence.

Again, that last part is just not true. They did not have to wait until the end of his sentence to release him. The minister of justice had the authority and had the discretion to release him before that.

Now, the documents that your Honor has, in terms of the minister of justice's decisions -- those are in response to after an extradition request was finally made after the 34 months and then after Mr. Cavan's lawyer then was fighting the extradition in large part based on that delay of 34 months.

And then it was in response to Mr. Cavan's lawyer's arguments that the minister of justice and the Canadian authorities then inquired of the U.S. government what took so long, and then the U.S. government, in hindsight, tried to explain what took so long.

There was no documentation from the first time the government made the request to Canada that Canada said, you have to give us more proof of the charges before we'll honor this request or even consider the request. No such request was ever made by the Canadian authorities or required by the

Canadian authorities.

The Canadian authorities, when they asked more information about the delay, they were acting so they could respond to Mr. Cavan's motions on appeal trying to fight the extradition after that 34 months.

So at that point, the minister of justice acknowledges he had the discretion, but he never says he would not have exercised it. That's notable, that he never says he would never have exercised it. What we know is that the U.S. government never asked him to exercise it.

THE COURT: Let's take a look at what he did say. On page 6, "With respect to persons sought, serving sentences in Canada, I note that Section 64 of the Act provides that unless I order otherwise," because parenthetically, this is the decision of the Honorable Peter McKay to make as the minister of justice. This is the Honorable Peter McKay ruling on the extradition application relevant to Mr. Cavan.

He says, "Unless I order otherwise, the surrender order does not take effect until after the person has been discharged, whether by expiry of the sentence or otherwise. Your materials," he states, "indicate that Mr. Cavan was not eligible for statutory release until September 5, 2013, and that his sentence does not expire until July 27, 2015.

"In the circumstances, it is not apparent that an earlier request for extradition would have resulted in

Mr. Cavan's earlier release from custody in relation to the sentence he is currently serving in Canada." That's the end of the quote on page 6.

Now, that is not the statement of an observer. That's a statement of the individual who held the discretion to have terminated the Canadian sentence and ordered otherwise.

He says, based on his review of the materials before him, that it is not apparent that an earlier request would have resulted in an earlier release.

Why isn't that adequate?

MR. LEVINE: Because he doesn't say, certainly, that it would not have. He does not make a definitive statement, number one.

Number two, as I said, in hindsight, this is them talking about whether extradition should be granted at this later point in time when it was being fought.

This wasn't something he was saying immediately upon an extradition request and a fight at that point about whether to grant extradition or not grant extradition at an earlier point.

THE COURT: Let's take a situation which is maybe counterfactual. Let's assume that Section 64 of the Act did not have the language, "Unless the minister orders otherwise" in it. Let's assume that wasn't in there. Let's assume that a Canadian official, perhaps the royal governor, prime minister,

has a pardon authority.

Couldn't you make the same identical argument here that, well, the sentence could have ended earlier? He could have been pardoned.

MR. LEVINE: Well, I think that it could be made, but more importantly, I think that that takes it to another extreme. The whole point is that this isn't a statute. This is the prime minister's authority. There's nothing left to hypothetical or to speculation.

THE COURT: Presumably pardon power is set forth in a foundational document, whether it's a statute or a constitutional document of some sort. So assume that there is a pardon power. You would have the same argument, that he could have been pardoned and, therefore, it could have ended earlier.

MR. LEVINE: Except that in that situation, it also depends on what the track record is and how often pardons are granted, if ever, for those purposes by Canadian authorities and what information the United States government had about that.

Did the United States government ever ask Canadian ministers or a prime minister to pardon anybody for extradition purposes? Has anybody ever done that? Has a Canadian prime minister ever done that?

The burden is on the government to prove by

substantial evidence that it would have been futile, not that it could have been futile but that it would have been futile, and that's a significant distinction.

Having never asked in this case for the minister of justice to exercise that discretion, the government is in no position to say that it would not have been exercised.

All they can point to is something in hindsight that's based on a different legal argument that has nothing to do with the actual issue.

That's dealing with certainly a much different legal issue under Canadian law about whether extradition should be granted or whether he has a legal grounds to fight it three years later based on the delay, and that's looking backwards.

It has nothing to do with whether the government had asked in 2009 and said, look. Mr. Cavan is serving a United States sentence, not a Canadian sentence, a United States sentence for a United States crime in your jail because we transferred him to you, and now we want him back for another United States crime. We would like him back. Whose interests really are paramount there?

The Canadian authorities later on explicitly said, even when extraditing him for this even on the new case, the U.S. government's interests were paramount to theirs even though the charge was that he was trying to bring drugs into Canada.

But, given that he was serving a United States sentence, not a Canadian sentence, for a United States crime, not a Canadian crime, and that he was in on a parole violation based on another United States crime and they only knew about that because the United States DEA or other authorities had in fact informed them explicitly of it after the felony indictment rather than just asking for extradition, there's every reason to believe that if all those things had been presented in a timely manner, looking at it forwardly instead of backwardly, that the minister of justice would have said, you know, the United States has a good point here. Their interests are paramount to ours. We don't really have a horse in this race. This is between Mr. Cavan and the United States. The past crime is, the sentence he's serving is, and the new case is. So this makes this a rather extraordinary case.

THE COURT: Let me ask this of you. I hear your argument loud and clear. Let me ask you: If I understood what you said a moment ago, you acknowledge that the failure to ask for an earlier release and that request having been denied does not doom the government's position in this case if they can show that it would have been futile to do so? Is that your position?

MR. LEVINE: Judge, I think it's a strength to take that position based on Second Circuit case law. For purposes of preserving the argument for any higher court, my argument is

that without actually asking and making the effort, that is not sufficient.

But I understand there's Second Circuit case law in I think it's People v. Blanco in which the issue is Columbia. There's another case dealing with Greece where there's a track record, and they know what the relationships are between the countries and that, for example, either Columbia or Mexico has a policy not to extradite people to the United States on drug crimes or capital crimes or things like that; that there's such a track record and the other country has made it so clear that they will not comply that that satisfies their burden of showing substantial evidence that it would be futile.

Here they haven't shown anywhere near that. They haven't shown anything like that. I would also point out that in the government's letter at the bottom of page 1 going into the top of page 2, the government talks about a conversation that somebody had with somebody in Canada, some Canadian authorities that are really unspecified.

They didn't get an affidavit from anybody in Canada. They don't really lay out all the details of it. I don't know what the Canadian authorities were told about Mr. Cavan's particular circumstances such as that the parole violation he was serving for at that time in Canada was for an American crime on an American sentence, an American-imposed sentence, as opposed to a Canadian crime on a Canadian sentence where it was

their laws that were violated and they had an interest in seeing that he serve out that full sentence. So I don't know whether that was conveyed to them in getting this opinion.

As I said, I don't know who gave the opinion. It certainly is not under oath. There are no real details. There's no law. There's no Canadian statute or law that's cited for the proposition, and it contradicts what the minister of justice himself said during the extradition proceedings.

THE COURT: How does it contradict him?

MR. LEVINE: Because this says that Canadian authorities -- this is the government's letter at page 2 -- "Canadian authorities have further represented that where, as here, the conduct underlying Cavan's Canadian parole violation was substantially the same as the conduct for which his extradition was sought. There was no basis for such an order," referring to an order by the minister of justice to release him early.

The minister of justice never cites anything like that. The minister of justice says, I have the authority to do it. He never cited anything like that. He never said, I wouldn't do it because it's the same conduct.

That doesn't really make sense that they wouldn't do it because it's based on the same conduct. Logic would dictate otherwise actually, considering especially his circumstances.

As I said, that it was an American sentence on an

American crime that he was serving there and that the conduct that gave rise to the parole violation was an indictment in the United States as well.

So it contradicts him. There's no source for it. It's not under oath. I think basically that that sentence should really be ignored by the Court. It should carry no weight whatsoever. It certainly doesn't rise to the level of substantial evidence.

THE COURT: Thank you, Mr. Levine. Let me give Mr. Imperatore an opportunity to respond.

MR. IMPERATORE: Yes, your Honor. Our positions are set forth in our submissions. I just want to briefly just tie this back to what the standard is here.

It's not the government's burden to show by substantial evidence that an extradition request was futile. It's the defendant's burden to show, under Barker v. Wingo that the four Barker factors on balance weigh in favor of a conclusion that speedy trial rights were infringed. Against this backdrop, your Honor, it's not a close question. All of the operative factors favor the government.

I think really -- and the Court honed in on this -- the dispositive factors really are, number one, that both the minister and the Canadian Court of Appeal recognized that the surrender order does not take it into effect until the expiration of the parole sentence.

Second, the minister really appreciated his discretion. He was the guy who it was up to to make the decision. He acknowledged his discretion.

I also think it's worth noting that Mr. Cavan never challenged his parole violation. He had the ability to do that in Canada. He never once sought review of that.

THE COURT: Why is that relevant?

MR. IMPERATORE: I think it's relevant, your Honor, because, to the extent there's a claim here that he was incarcerated because of the delay and that -- well, it's relevant to the extent that if the claim is, well, the government should have sought his extradition sooner, Mr. Cavan could have challenged his parole and presumably moved the minister or someone else to the conclusion that he should have been released earlier, and, in that case, perhaps his extradition would have been expedited.

He had the ability to do that. He didn't take that step. I think it's obvious why. He then spent nearly two years after the surrender decision challenging the minister's order so that he would not have to face charges here in the Southern District of New York.

Finally, with respect to the claim that this was an American sentence on an American crime, the record reflects just the opposite. I think what the minister and the Canadian Court of Appeal state in their opinion is that this parole

violation was an entirely separate offense that had two separate grounds: Number one, his committing another crime; and second, his association with drug dealers.

Second, putting aside the fact that the United States did supply information to Canadian authorities, it wasn't any delay or action or inaction on the part of the United States that led to his extradition. It was the fact of this parole violation.

So, for those reasons, your Honor, we submit that this is not a close question and that the Court should deny the motion.

THE COURT: What should I make of your claimed opinion from a Canadian source as to what would have happened?

MR. IMPERATORE: Well, your Honor, I think what the government endeavored to do in its letter was to address questions that your Honor had asked at the last conference, and one of the questions that was asked related to this particular issue.

I think it's not a dispositive point. I don't think the Court needs to make a finding on this in order to deny the motion. I think the dispositive points are the ones that I just articulated.

But I think the takeaway here is that it made sense that the minister did not order otherwise and did not order the defendant's release before the expiration of his parole

sentence.

The reason for that is there are significant Canadian interests at stake here too, and it made sense that he would be detained in Canada for serious parole violations on the very same facts for which his extradition was sought.

THE COURT: Mr. Levine, I'll give you the last word.

MR. LEVINE: Thank you, Judge. Mr. Cavan was being held on parole violations. That's not the same as the federal system supervised release and things like that. There's no separate offense.

It was sent back to continue serving the sentence that had been previously imposed by the American court in Minneapolis, and he had been released early on early parole in Canada, actually much earlier than he would have been in the United States.

And then, when the United States informed Canada of the indictment instead of just requesting extradition and just gave them this information and said, we have an indictment and this is what he did, they violated him on that parole and then had him go back to jail to fulfill and continue serving the sentence that had been previously imposed.

There was no new sentence. There was no new crime. There was no new indictment in Canada. There was no trial in Canada. There was not a new sentence to be served, a Canadian sentence. It was still the American sentence that was being

served that had to be continued because he had been released early.

THE COURT: It's akin to a situation with supervised release in that it's a separate violation of trust. The Canadian authorities trusted him and released him on parole and found that their trust was violated in doing so. And, therefore, they ordered him returned to prison because of that violation of trust on a uniquely Canadian feature of the sentence, parole, something that would not exist here under the federal system.

MR. LEVINE: But the fact is that the sentence he continued to serve was still the American sentence, not a new Canadian sentence.

THE COURT: Correct. Do we have another date to get together in this case?

MR. LEVINE: Not yet.

THE COURT: This is what I propose to do: I'm going to issue a written ruling, and I expect to do it by the end of this month. I suggest that provisionally we set another date in this case. If it becomes unnecessary, so be it. If it becomes necessary, we will have the date already established.

Would it be convenient to gather on August 30 at 3:00 p.m.?

MR. LEVINE: That works for me, Judge.

THE COURT: Mr. Imperatore?

MR. IMPERATORE: That's fine with the government, your Honor.

THE COURT: Let me set the next conference for August 30 at 3:00 p.m. provisionally. Mr. Imperatore, do you have an application?

MR. IMPERATORE: Yes, your Honor. The government moves to exclude time pursuant to the Speedy Trial Act in the interests of justice from today until August 30.

Such an exclusion of time would allow the defendant to continue to review the discovery the government has produced and to explore any potential disposition of the case.

THE COURT: Mr. Levine?

MR. LEVINE: I'll consent to that at this time, Judge.

THE COURT: All right. I find that the ends of justice will be served by granting a continuance to August 30 and that the need for a continuance outweighs the best interests of the public and the defendant and a speedy trial.

The reasons for my finding are that the time is needed, first of all, for the Court to consider the arguments here presented today and to prepare a written decision and, thereafter, for the parties to assess the consequences of that decision and decide on next steps in the case, which, if the case goes forward, will be decided at the August 30 conference. Accordingly, the time between today and August 30 is excluded under the Speedy Trial Act.

Is there anything further from the government?

MR. IMPERATORE: Not from the government, your Honor.

THE COURT: From the defendant?

MR. LEVINE: No, your Honor.

THE COURT: Thank you all very much.

(Adjourned)